In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1570

STATE OF KANSAS,
Petitioner,

vs.

HAL FARHA, GERALD FARHA, PHIL RAZOOK, JAMIE THOMPSON, JOHN D. KNIGHTLEY, JR., GRANT PARSONS, PETE CHRISTOPHER, and HERBERT COHLMIA,
Respondents.

STATE OF KANSAS,
Petitioner,

vs.

JOAN SOLLS, RUSSELL ADAMS, and FREDERICK MELZER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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Petitioner, the State of Kansas, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kansas entered in this case on December 13, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas is reported at 218 Kan. 394, 544 P.2d 341, and is included

as Appendix A. A motion for rehearing was denied on January 28, 1976, and the order of denial is included as Appendix B.

JURISDICTION

The opinion of the Supreme Court of Kansas was entered on December 13, 1975. A timely motion for rehearing was denied on January 28, 1976. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Does Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 merely require a state to enact a statute authorizing the interception of wire or oral communications or must a state enact statutes which mirror the terms of 18 U.S.C. §§ 2510-2520, where particular intercepts are applied for, granted, and executed in compliance with 18 U.S.C. §§ 2510-2520?

II. Does an oral authorization by a state attorney general to an assistant attorney general instructing the assistant attorney general to make a formal application for an electronic search warrant comply w:h 18 U.S.C. § 2516(2)?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this petition are as follows:

A. Kan. Stat. Ann. § 22-2513 (Supp. 1971), *repealed*, Kan. Sess. L. ch. 150, § 7 (1974):

> An *ex parte* order authorizing eavesdropping, as defined in K.S.A. 1969 Supp. 21-4001,

> may be issued by any justice of the supreme court or by any district judge as herein provided.
>
> (1) The attorney general an assistant attorney general or a county attorney may make an application to any of the above specified magistrates for an order authorized [sic] eavesdropping when the information to be obtained may provide evidence of the commission of any of the following offenses:
>
> (a) Any crime directly and immediately affecting the safety of a human life or the national security;
>
> (b) Murder;
>
> (c) Kidnapping;
>
> (d) Treason;
>
> (e) Sedition;
>
> (f) Practicing criminal syndicalism;
>
> (g) Commercial gambling;
>
> (h) Racketeering;
>
> (i) Commercial bribery;
>
> (j) Sports bribery;
>
> (k) Tampering with a sports contest;
>
> (l) Bribery; or
>
> (m) Any violation of the uniform narcotic drug act of the laws regulating hypnotic, somnifacient or stimulating drugs.
>
> The application for the order shall be in writing, shall be under oath and shall particularly describe the crime or crimes

under investigation and the person or persons whose conduct is to be observed or whose communications or conversations are to be overheard or recorded, and, in the case of a telephonic or telegraphic communication, shall identify the particular telephone number or telegraph line involved.

(2) The magistrate to whom application for an order authorizing eavesdropping is addressed shall examine, under oath, the applicant and any other witness he may produce and shall satisfy himself that there are reasonable grounds and probable cause therefor before granting such application and that there are no other means available for obtaining the evidence and that the evidence to be obtained is essential to the solution or prevention of the crime or may assist in the prosecution thereof. All testimony given on such examination shall be reduced to writing. The order shall be directed to any law enforcement officer of the state of Kansas. It shall state the ground for its issuance, and shall particularly describe the premises to be entered upon, the person or persons to be observed or whose communications or conversations are to be intercepted, the crime or crimes under investigation and the telephone number or telegraph line involved.

(3) The order authorizing eavesdropping shall specify the period during which it shall be effective, but in no case shall the said effective period continue more than ten days

from the date of issuance unless extended or renewed by the magistrate who signed and issued the original order upon satisfying himself that the facts which justified the issuance of the original order continue to exist and that such extension or renewal is in the public interest.

(4) Within three (3) days after the expiration of the order, the officer executing the order shall endorse thereon a statement of any action taken pursuant thereto and shall return the same to the magistrate by whom it was issued. If photographs have been taken or sound recordings made pursuant to said order, the return shall so state, and, the event of the prosecution of any person who has been the subject of eavesdropping, copies and transcripts of such photographs and sound recordings shall be made available to the defendant upon application to the court before whom the prosecution is pending.

B. Kan. Stat. Ann. §§ 22-2515 and 22-2516 (Supp. 1974) are included as Appendix C.

C. 18 U.S.C. §§ 2510(9), 2516, and 2518 are included as Appendix C.

STATEMENT OF THE CASE

A. Statement of Facts

In October, 1972, Mr. Patrick Connolly, an assistant attorney general for the State of Kansas, was contacted by special agents of the Kansas Bureau of Investigation (K.B.I.) concerning certain commercial

gambling activities of respondent Hal Farha. The special agents informed Mr. Connolly that a confidential and reliable informant had placed bets by telephone with Mr Farha in the presence of the K.B.I. agents. These bets were tape recorded with the consent of the informant. Mr. Connolly subsequently met with the Attorney General of Kansas and advised him of the evidence developed in the investigation. Mr. Connolly received the attorney general's oral authorization to apply to a Kansas district court for an electronic search warrant to tap Mr. Farha's telephone lines.

Mr. Connolly then prepared an application for an electronic search warrant and presented the application to the Honorable Adrian J. Allen, Judge of the Shawnee County, Kansas District Court. The two K.B.I. agents testified before Judge Allen and a tape recorded wagering conversation involving respondent Hal Farha was played for Judge Allen. Judge Allen found that probable cause existed for a warrant and did issue an electronic search warrant on October 24, 1972, to be enforced for a period of ten days.

On November 2, 1972, Mr. Connolly again applied to Judge Allen for two orders. These new applications were sought after Mr. Connolly had advised the attorney general of the progress of the investigation and after again receiving the attorney general's oral authorization to proceed. One application was for an extension of the original order and for an additional warrant on a new telephone number for Farha. The other application was for a warrant on the telephone line of respondent Gerald Farha. Judge Allen examined witnesses regarding the information revealed in the initial interceptions on Hal Farha's lines and found that probable

cause existed for the extension of the initial order and for the addition of the new telephone numbers. Both orders were for a ten-day period.

As a result of these electronic search warrants, search warrants were obtained in Sedgwick County for the Farhas' business establishments in Wichita, Kansas. The respondents' establishments were searched, physical evidence of gambling activities were seized and respondents were arrested in December, 1972. Commercial gambling and conspiracy informations were filed in the Sedgwick County District Court against both Farhas. Inventories of the intercepted conversations were filed with the district court at that time and also served on the Farhas.

Independently and without prior knowledge of the above investigation, an assistant district attorney for Sedgwick County received an anonymous telephone call in October, 1973, informing him that respondent Joan Solls was taking bets and that a bet could be placed by calling one of two telephone numbers given to the attorney. At approximately the same time, a detective in the Wichita Police Department vice section received an anonymous telephone call advising that respondent Frederick Melzer and "his partner" Joan Solls were engaging in bookmaking activities. The Wichita Police Department detective and certain K.B.I. agents then initiated physical surveillances of Solls and Melzer. The officers observed both of them engaging in certain gambling activities.

Details of this investigation were revealed to Keith Sanborn, District Attorney for Sedgwick County, Kansas. On December 13, 1973, Mr. Sanborn made application to the Honorable David P. Calvert, Judge of

the Sedgwick County District Court, for an electronic search warrant for the telephones of Solls and Melzer. After examining witnesses and the application of the district attorney, Judge Calvert found that probable cause to issue the warrant existed, that no other means were available to obtain the evidence desired and that probable cause existed to believe that the crimes committed were continuing crimes. The court further ordered that the wiretaps not cease at the conclusion of the first conversations intercepted.

On December 19, 1973, a ten-day extension of the original electronic search warrant was sought. The court conducted an evidentiary hearing, examined witnesses involved and listened to conversations intercepted under the December 13 order. The court granted the extension. Evidence seized under the December 13 order and its extension disclosed that respondents Solls and Melzer were engaged in gambling activities with respondent Russell Adams.

On January 9, 1974, District Attorney Sanborn sought an electronic search warrant for the telephone lines of respondent Russell Adams. Judge Calvert granted the district attorney's application after conducting an evidentiary hearing. On January 19, 1974, Judge Calvert extended the order for a ten-day period.

Each application and electronic search warrant order involved in the two December, 1973, and the two January, 1974, intercepts complied with the requirements of 18 U.S.C. §§ 2510-2520.

Independently of all the foregoing, in June, 1974, a Federal Bureau of Investigation (F.B.I.) agent observed a man, later identified as respondent Phil Razook, engaging in bookmaking activities in a private club in

Wichita, Kansas. The F.B.I. agent informed a local F.B.I. agent who notified the Wichita police and police officers subsequently observed respondent Razook making and transmitting bets over a pay phone at the club. A vice detective in the police department and two other officers later, through numerous visual observations, were able to ascertain that the numbers called by Razook were listed to respondent Hal Farha. As a result of their physical surveillance, the officers also discovered that Razook met often with respondents Melzer and Hal Farha. The information, coupled with other information known to him, prompted District Attorney Sanborn to apply to Judge Calvert for an electronic search warrant on July 2, 1974.

On July 1, 1974, Kan. Stat. Ann. § 22-2513 (Supp. 1971), the statute under which all but the last warrant were issued, was repealed and superseded by Kan. Sess. L. ch. 150 (1974), which was codified as Kan. Stat. Ann. §§ 22-2514 to 22-2519 (Supp. 1974). The new provisions essentially mirrored the provisions of 18 U.S.C. §§ 2510-2520.

After a hearing on July 2, 1974, Judge Calvert found probable cause and issued an electronic search warrant as applied for by District Attorney Sanborn under Kan. Stat. Ann. § 22-2514 (Supp. 1974).

On September 12, 1974, District Attorney Sanborn filed informations against all the respondents charging them with commercial gambling and conspiracy to commit commercial gambling.

B. How the Federal Question Arose

Shortly after the informations had been filed against them, the respondents filed motions to suppress all evi-

dence obtained by virtue of the electronic search warrants described above and attacking the constitutionality of Kan. Stat. Ann. § 22-2513 (Supp. 1971).

On February 20, 1975, after hearing evidence, the district court ruled that Kan. Stat. Ann. § 22-2513 was constitutionally and statutorily defective because it conflicted with 18 U.S.C. § 2516(2) and it purported to grant to state authorities broader authority to seek an electronic search warrant than permitted the states under 18 U.S.C. §§ 2510-2520. The court also found that the July 2, 1974, electronic search warrant, issued pursuant to the newly enacted Kan. Stat. Ann. §§ 22-2514 to 22-2519 (Supp. 1974), was tainted by the prior warrants because the evidence of probable cause on which the July 2 warrant was based was so intermingled with evidence obtained under the earlier intercept orders that it was impossible to separate out and differentiate between them. The district court suppressed all evidence obtained under the warrants and, in particular, held that the testimony of all witnesses endorsed on the informations was suppressed, subject to the district attorney establishing by separate hearing, that any particular witness was not tainted by the suppressed intercepts and that the witness' identity became known to the prosecution through independent sources.

Petitioner applied for and was granted leave to file an interlocutory appeal to the Supreme Court of Kansas. On December 13, 1975, the supreme court ruled that Kan. Stat. Ann. § 22-2513 (Supp. 1971) was constitutionally defective in that it did not comply strictly to the terms of 18 U.S.C. §§ 2510-2520. The supreme court ruled: "If a State wiretap statute is more permissive than the federal act, any wiretap authorized

thereunder is fatally defective and the evidence thereby obtained is inadmissible under 18 U.S.C. § 2515." *State* v. *Farha*, 218 Kan. 394, Syl. ¶ 3, 544 P.2d 341 (1975). The court also held that Kan. Stat. Ann. § 22-2513 (Supp. 1971) was defective because it permitted any assistant attorney general to make application for an electronic search warrant in conflict with 18 U.S.C. § 2516(2). The court ruled that the attorney general's oral authorization to Assistant Attorney General Patrick Connolly to proceed with an application for an electronic search warrant was an insufficient authorization under 18 U.S.C. § 2516(2).

REASONS FOR GRANTING THE WRIT

I. Even Though the Procedural Provisions of a State Statute Authorizing Interception of Oral and Wire Communications Are Unconstitutional, If There Is a State Statutory Grant of Authority for the Issuance of Electronic Search Warrants, Evidence Seized Under Authority of Such a Warrant Is Admissible at Trial If the Procedures Actually Followed by State Authorities in Obtaining and Executing the Electronic Search Warrant Complied With 18 U.S.C. §§ 2510-2520.

The Kansas Supreme Court ruled, in the instant case, that:

> If a State wiretap statute is more permissive than the federal act, *any wiretap authorized thereunder* is fatally defective and the evidence thereby obtained is inadmissible under 18 U.S.C. § 2515.

State v. *Farha*, 218 Kan. 394, Syl. ¶ 3, 544 P.2d 341 (1975). The State of Kansas submits that this construction of the federal statutes and the current case law is far too narrow an interpretation of the requirements of the Fourth Amendment of the Constitution.

It is axiomatic that Title III of the Omnibus Crime Control and Safe Streets Act is not self-executing with respect to the fifty states. *Halpin* v. *Superior Court*, 6 Cal. 3d 885, 101 Cal. Rptr. 375, 495 P.2d 1295, *cert. denied sub nom. California* v. *Halpin*, 409 U.S. 982, 93 S. Ct. 318, 34 L. Ed. 2d 246. It is also well established that the Act preempts any state statutes purporting to regulate electronic eavesdropping. *People* v. *Conklin*, 12 Cal. 3d 259, 114 Cal. Rptr. 241, 522 P.2d 1049 (1974); *State* v. *Siegel*, 266 Md. 256, 292 A.2d 86 (1972). Congress, however, did extend to the states a limited right to enact statutes *authorizing* wiretaps where the wiretaps are applied for and executed in conformity with the federal Act.

18 U.S.C. § 2516(2) provides, in pertinent part, that:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, *may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute* an order authorizing or approving the interception of wire or oral communications . . . . (emphasis supplied).

A "judge of competent jurisdiction" is defined as:

> A judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions or wire or oral communications.

18 U.S.C. § 2510(9)(b).

One of the primary purposes of Title III was defined in section 801(d) of Pub. Law 90-351, as follows:

> On the basis of its own investigations and of published studies, the Congress makes the following findings:
>
> * * *
>
> (d) to safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed *only when authorized by a court of competent jurisdiction* and should remain under the control and supervision of the authorizing court. (emphasis supplied).

The State of Kansas would submit that the clear import of these statutory provisions is that Congress had no intention of requiring each and every state legislature to enact state statutes mirroring in every respect the terms of Title III. The Congress clearly intended to preempt the field of electronic surveillance legislation and clearly intended that the fifty states comply with the strict terms of 18 U.S.C. §§ 2510 *et seq.* If any particular electronic search warrant is applied for and executed in strict compliance with the provisions of 18 U.S.C. §§ 2510-2520, it is immaterial what a state statute provides—as long as the state statute authorizes a court of competent jurisdiction to issue an electronic search warrant. In short, the state court of competent jurisdiction takes its legal authority to issue an electronic search warrant directly from the provisions of 18 U.S.C. §§ 2510-2520 and a simple enabling statute from the state.

II. Under the Provisions of 18 U.S.C. § 2516(2) an Oral Approval, After Reviewing All the Evidence in the Investigation, From the State Attorney General Authorizing an Assistant Attorney General to Make Application to a State Court of Competent Jurisdiction Is a Sufficient "Application."

18 U.S.C. § 2516(2) provides, in pertinent part, that:

> The principal prosecuting attorney of any State . . . if [he] is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant . . . an order authorizing or approving the interception of wire or oral communications . . . .

This Court has on a number of occasions addressed the question of which officials, on the federal level, have authority under 18 U.S.C. § 2516(1) to apply for an electronic search warrant. *E.g. United States* v. *Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341; *United States* v. *Chavez*, 416 U.S. 562, 94 S. Ct. 1849, 40 L. Ed. 2d 380 (1974). The State of Kansas is unable to find any decisions which address the particular question whether an oral authorization by a state attorney general, such as the one at bar, is a proper "application" under 18 U.S.C. § 2516(2). However, the state would submit that the principles set forth in the federal cases are applicable, by analogy, to the case at bar. The substance of the authorization, and not the form of the authorization, is the determinative factor. *United States* v. *Falcone*, 505 F.2d 478 (3rd Cir. 1974); *United States* v. *Robertson*, 504 F.2d 289 (5th Cir. 1974); *United States* v. *Ramsey*, 503 F.2d 524 (7th Cir. 1974; *United States* v. *Brick*, 502 F.2d 219 (8th Cir. 1974); *United States* v. *Bowdach*, 501 F.2d 220 (5th Cir. 1974). The intent of Title III is to require the centralization of policy relating to electronic surveillance in the chief prosecuting officers in any state. It is not necessary, in effectuating that centralization, that the chief prosecuting attorney personally appear in the issuing court and personally make application for the warrant. *United States* v. *Tortorello*, 480 F.2d 764 (2nd Cir. 1973); *United States* v. *Manfredi*, 488 F.2d 588, 601 (2nd Cir. 1973).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Kansas Supreme Court.

Respectfully submitted,

CURT T. SCHNEIDER
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KEITH SANBORN
District Attorney for the 18th Judicial District of Kansas

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APPENDIX

APPENDIX A

No. 47,839

STATE OF KANSAS,
Appellant,

v.

HAL FARHA, GERALD FARHA, PHIL RAZOOK, JAMIE THOMPSON, JOHN D. KNIGHTLEY, JR., GRANT PARSONS, PETE CHRISTOPHER, and HERBERT COHLMIA,
Appellees.

STATE OF KANSAS,
Appellant,

v.

JOAN SOLLS, RUSSELL ADAMS
and
FREDERICK MELZER,
Appellees.

(Filed December 13, 1975)

SYLLABUS BY THE COURT

1. Constitutional principles and rules relating to the interaction between federal and state statutes applicable to wiretapping or electronic surveillance are stated and applied.

2. In an appeal by the state from an order suppressing evidence obtained by electronic search warrants, it is *held:*

(a) K.S.A. 1971 Supp. 22-2513(1) (now repealed), providing a procedure for obtaining eaves-

dropping orders, was more permissive than 18 U.S. Code § 2516(2) in that it purported to authorize an assistant attorney general to make application for a wiretap order and therefore was invalid as in conflict with the federal act.

(b) The provisions of K.S.A. 1971 Supp. 22-2513 (now repealed) were violative of the right of privacy guaranteed by the fourth amendment to the federal constitution and were in conflict as well with certain sections of 18 U.S. Code §§ 2510-2520, as stated in the opinion.

(c) Pursuant to the provisions of 18 U.S. Code § 2515 evidence derived from communications obtained in a prior illegal electronic surveillance must be suppressed unless such derivative evidence is based on an independent source untainted by the illegally obtained communications.

(d) The trial court did not err in suppressing the evidence obtained by the electronic search warrants.

Appeal from Sedgwick district court, division No. 8; NICHOLAS W. KLEIN, judge. Opinion filed December 13, 1975. Affirmed.

The opinion of the court was delivered by

HARMAN, C.: This interlocutory appeal by the state seeks to vacate an order suppressing evidence obtained by electronic search warrants. Defendants in the case are charged with numerous counts of commercial gambling (K.S.A. 21-4304) and conspiracy to commit commercial gambling (K.S.A. 21-3302).

All but one of the electronic search warrants were issued pursuant to K.S.A. 1971 Supp. 22-2513 (repealed

and superseded effective July 1, 1974). The defendants contended this statute was unconstitutional on its face and also invalid because it did not comply with standards for electronic surveillance established by federal statutes. The trial court agreed. It further ruled that the evidence obtained in the last warrant, issued pursuant to our present statutes on electronic surveillance and whose validity has not been challenged, was "fatally tainted" by the prior illegally obtained evidence and must also be suppressed. In all, five electronic search warrants and three extension orders were issued between October 24, 1972, and July 2, 1974. Pertinent facts may be stated in three chronological groups: (1) Warrants obtained in Shawnee county pursuant to our former statute; (2) those obtained in Sedgwick county pursuant to the same law; and (3) one obtained in Sedgwick county pursuant to our present law (K.S.A. 22-2514 to 22-2519 [Weeks 1974]).

1. Shawnee county warrants—K.S.A. 1971 Supp. 22-2513

In October, 1972, Mr. Patrick Connolly, assistant attorney general in charge of the criminal division of the Kansas attorney general's office, received information from two special agents of the Kansas bureau of investigation concerning commercial gambling activities (bookmaking on sporting events) of defendant Hal Farha in Wichita. A confidential informant, who had given reliable information in the past, had placed bets with Mr. Farha by telephone in the presence of a KBI agent, which were tape recorded with the consent of the informant. As revealed by an affidavit dated March 21, 1975, Mr. Connolly outlined to the then attorney general the evidence developed in the investigation and received his authorization to apply for an electronic search

warrant to tap Mr. Fahra's telephone lines. Mr. Connolly then prepared an application and on October 24, 1972, presented it to the Honorable Adrian J. Allen, judge of division No. 4 of the Shawnee county district court.

Two KBI agents, who had actively participated in the investigation, testified and a recorded wagering transaction with defendant Hal Farha was played for the court. The court found that probable cause existed to issue the warrant. The order for an electronic search warrant was for a period of ten days. On November 2, 1972, again after reviewing information obtained with the attorney general and receiving his authorization, Mr. Connolly applied to Judge Allen for two orders. One application was for an extension of the October 24th order and also for authority to intercept an additional telephone number obtained under the first wiretap order. The other was for authorization to intercept and record conversations on telephone numbers belonging to defendant Gerald Farha. The court examined witnesses regarding the progress of the interceptions and results obtained, found that probable cause existed for an extension of the original order and the addition of new numbers and also for the interception and recording of Gerald Farha's communications. Both orders were for a ten day period.

As a result of evidence secured from these interceptions search warrants were issued under which searches and arrests were made on December 1 and 2, 1972, at the defendants Farhas' business establishments in Wichita. Physical evidence was seized, witnesses were interviewed and commercial gambling and conspiracy informations were filed against the two Farhas

on December 1, 1972. Inventories of intercepted materials were filed with the court on December 20, 1972, and served on the Farhas at that time. No other notices of intercepted conversations were ever filed or served upon any other parties to this action nor was any request for determination of persons who should be served with inventories ever made to the district court of Shawnee county or of Sedgwick county.

2. Sedgwick county warrants—K.S.A. 1971 Supp. 22-2513

Independently of the foregoing, in October, 1973, Mr. Reese Jones, assistant district attorney of Sedgwick county, received an anonymous phone call informing him that defendant Joan Solls was taking bets and that a bet could be placed with her by calling one of two named telephone numbers and by stating that the caller had been referred by a certain named person. In addition, Detective Beverly Artman of the Wichita police department received a call informing him of the bookmaking activities of defendant Frederick "Mo" Melzer and his "partner" Joan Solls. Detective Artman and certain KBI agents then conducted extensive physical surveillance of both Solls and Melzer and observed several suspected gambling transactions. Details of this investigation were discussed with Mr. Keith Sanborn, district attorney of Sedgwich county, and on December 13, 1973, he made application to the Honorable David P. Calvert, judge of division No. 9 of the district court of Sedgwick county, for an electronic search warrant for the telephones of Joan Solls, used by her and defendant Melzer. After examining sworn witnesses and the district attorney's verified application the court found there was probable cause to issue the warrant,

no other means were available to obtain the evidence sought, that probable cause established that a continuing crime was being committed. A warrant was issued and the court ordered that the surveillance not be terminated when the first conversation was seized.

This warrant produced evidence of commercial gambling and conspiracy to commit that crime. A ten day extension of it was sought and granted on December 19, 1973, after another evidentiary hearing held before Judge Calvert. Interceptions under the December 13th order and its extension disclosed gambling activities on the part of Solls and Melzer and of defendant Russell Adams.

On January 9, 1974, the district attorney made an application to Judge Calvert for an electronic search warrant for communications of defendant Adams. After an evidentiary hearing a warrant was issued. On January 19, 1974, Judge Calvert extended this order for a ten day period.

3. Sedgwick county warrant—K.S.A. 22-2514 to 22-2519 (Weeks 1974)

In June, 1974, an FBI agent observed a man, identified to him as Phil Razook, engaged in bookmaking activities at a private club in Wichita. He informed another FBI agent of this and the latter in turn observed Razook making and transmitting bets over a pay phone at the club. Detective Artman and two other police officers, through numerous observations, were able to ascertain that the numbers Razook was calling were listed to defendant Hal Farha. Their physical surveillance also revealed that Razook met often with Farha and Melzer. Armed with this and other information to be mentioned later, Mr. Sanborn on July 2,

1974, made application to Judge Calvert for an electronic search warrant against the defendants Razook, Melzer and Hal Farha. (Meanwhile, on July 1, a new Kansas statute governing electronic surveillance, now K.S.A. 22-2514 to 22-2519 [Weeks 1974] became effective. It repealed and superseded 22-2513 and essentially follows the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [U.S.C. §§ 2510-2520].) After an evidentiary hearing Judge Calvert found probable cause and issued the requested order.

More evidence was gathered pursuant to this order and on September 12, 1974, the Sedgwick County district attorney filed informations against all defendants, alleging offenses of commercial gambling and a continuing conspiracy to commit gambling. Thereafter defendants moved to suppress all evidence obtained from the electronic search warrants. On February 20, 1975, the Honorable Nicholas W. Klein, judge of division No. 8 of the Sedgwick county district court, ruled that K.S.A. 1971 Supp. 22-2513 was constitutionally invalid, was deficient also because it did not comply with the procedures required by federal statute and purported to give state officials (assistant attorneys general) broader authority in seeking an electronic search warrant than was permissible under 18 U.S.C. § 2510 *et seq.* The court suppressed the evidence obtained under all the warrants issued before July 1, 1974. It further found that the July 2, 1974, warrant issued pursuant to our present state statutes (K.S.A. 22-2514, *et seq.* [Weeks 1974]) was "fatally tainted" by the illegally obtained evidence under the prior warrants. The court suppressed all the evidence derived from the July 2d intercept and it held that the testimony of

witnesses endorsed on the informations filed September 12, 1974, should also be suppressed, subject to establishment by the state that the testimony of any particular witness was not tainted by the defective intercepts. In its suppression order the court found that all defendants were "aggrieved parties" pursuant to the provisions of 18 U.S.C. § 2510, *et seq*. This appeal by the state ensued.

We should first examine the legal background and history of wiretapping or, as it has sometimes been called, "eavesdropping". The fourth amendment to the federal constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

This proviso embodies one of our most cherished freedoms—the security of one's privacy against arbitrary police intrusion. Unreasonable searches and seizures are forbidden. In 1928, in *Olmstead* v. *United States*, 277 U.S. 438, 72 L. ed. 944, 48 S. Ct. 564, the federal supreme court held that wiretapping did not constitute a search within the meaning of the fourth amendment. Over the course of the years and the development of electronic eavesdropping technology so sophisticated and pervasive that a person's conversation under virtually any circumstances can be monitored, this viewpoint changed, doubtless prompted by the indiscriminate use of these awesome devices. In 1967 in *Berger* v. *New York*, 388 U.S. 41, 18 L. ed. 2d

1040, 87 S. Ct. 1873, and *Katz* v. *United States*, 389 U.S. 347, 19 L. ed. 2d 576, 88 S. Ct. 507, the supreme court abandoned the "physical intrusion" doctrine that formed the basis of the *Olmstead* decision and concluded that the fourth amendment protects people, and not simply places, against unreasonable searches and seizures.

In *Berger* a New York statute was held unconstitutional, for a number of reasons, as authorizing general searches by electronic devices. The court did not rule that all electronic surveillance violated the fourth amendment. Electronic surveillance could be conducted if it was done " 'under the most precise and discriminate circumstances, circumstances which fully met the "requirement of particularity" ' of the Fourth Amendment". (388 U.S. at p. 56.) In *Katz* the court stressed the necessity of a showing of probable cause before an independent judicial officer before electronic surveillance could be conducted.

Responding to these decisions, and seeking to provide the judicial procedures and controls found lacking, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified in 18 U.S.C. §§ 2510-2520. Legislative history on the subject tells us:

> "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. To assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly

authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause." (1968 U.S. Code Cong. and Admin. News, S. Rep. 1097, 90th Congress, 2d Session, pp. 2112, 2153, [referred to hereafter as S. Rep.].)

Federal courts of appeal in all the circuits but one have now considered Title III and have held it constitutional.

Although Congress in enacting Title III preempted the field of electronic surveillance regulation under its power to regulate interstate communications, it did at the same time allow for concurrent state regulation subject, at the minimum, to the requirements of the federal regulation (U.S.C. § 2516 [2]). This statement of congressional intent with respect to wiretap standards provided by the states was made:

". . . The State statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation. State legislation enacted in conformity with this chapter should specifically designate the principal prosecuting attorneys empowered to authorize interceptions. The State judge of competent jurisdiction . . . empowered by the State legislation to grant orders for interceptions would have to make the findings which would be the substantial equivalent to those required by section 2518(3) . . . and the authorization itself would have

to be made in substantial conformity with the standards set out in section 2518. . . ." (S. Rep. 2187.)

Several principles emerge from decisions interpreting 18 U.S.C. § 2516(2) providing for state regulation of electronic surveillance. First, the federal act is not self-executing on the states; in order to obtain a wiretap warrant from a state court there must be a state wiretap statute in effect (*State* v. *Siegel*, 266 Md. 256, 292 A. 2d 86; *Halpin* v. *Superior Court*, 6 Cal. 3d 885, 101 Cal. Rptr. 375, 495 P. 2d 1295, cert. den. 409 U.S. 982, 34 L. ed. 2d 246, 93 S. Ct. 318).

Second, although a state may adopt a statute with standards more stringent than the requirements of the federal law (*Alderman* v. *United States*, 394 U.S. 165, 22 L. ed. 2d 176, 89 S. Ct. 961; *Cooper* v. *California*, 386 U.S. 58, 17 L. ed. 2d 730, 87 S. Ct. 788), a state may not adopt a statute with standards more permissive than those set forth in Title III (*In re Olander*, 213 Kan. 282, 515 P. 2d 1211). "A State statute would be preempted where the State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Commonwealth* v. *Vitello*, Mass., 327 N.E. 2d 819, 835). If a state wiretap statute is more permissive than the federal act, any wiretap authorized thereunder is fatally defective and the evidence thereby obtained is inadmissible under 18 U.S.C. § 2515.

Broadly stated, the issues on appeal here with respect to all but the last of the wiretaps are whether K.S.A. 1971 Supp. 22-2513 was on its face violative of the fourth amendment to the federal constitution and also deficient in its conformance to the mandate

of 18 U.S.C. §§ 2510-2520. Necessarily there is overlapping in these considerations because the procedure set out in the federal statutes embodies the constitutional requirements established in *Berger* v. *New York*, supra.

We look first at the wiretaps authorized by the Shawnee county district court, secured upon application of an assistant attorney general. K.S.A. 1971 Supp. 22-2513 provided:

> "*Order authorizing eavesdropping.* An *ex parte* order authorizing eavesdropping, as defined in K.S.A. 1969 Supp. 21-4001, may be issued by any justice of the supreme court or by any district judge as herein provided:
>
> "(1) The attorney general, an assistant attorney general or a county attorney may make an application to any of the above specified magistrates for an order authorized eavesdropping when the information to be obtained may provide evidence of the commission of any of the following offenses:
>
> . . .
>
> "(g) Commercial gambling;
>
> . . .
>
> "The application for the order shall be in writing, shall be under oath and shall particularly describe the crime or crimes under investigation and the person or persons whose conduct is to be observed or whose communications or conversations are to be overheard or recorded, and, in the case of a telephonic or telegraphic communication, shall identify the particular telephone number or telegraph line involved.

> "(2) The magistrate to whom application for an order authorizing eavesdropping is addressed shall examine, under oath, the applicant and any other witness he may produce and shall satisfy himself that there are reasonable grounds and probable cause therefor before granting such application and that there are no other means available for obtaining the evidence and that the evidence to be obtained is essential to the solution or prevention of the crime or may assist in the prosecution thereof. All testimony given on such examination shall be reduced to writing. The order shall be directed to any law enforcement officer of the state of Kansas. It shall state the ground for its issuance, and shall particularly describe the premises to be entered upon, the person or persons to be observed or whose communications or conversations are to be intercepted, the crime or crimes under investigation and the telephone number or telegraph line involved.
>
> "(3) The order authorizing eavesdropping shall specify the period during which it shall be effective, but in no case shall the said effective period continue more than ten days from the date of issuance unless extended or renewed by the magistrate who signed and issued the original order upon satisfying himself that the facts which justified the issuance of the original order continue to exist and that such extension or renewal is in the public interest.
>
> "(4) Within three (3) days after the expiration of the order, the officer executing the order shall endorse thereon a statement of any action taken pursuant thereto and shall return the same to the magistrate by whom it was issued. If

photographs have been taken or sound recordings made pursuant to said order, the return shall so state, and, in the event of the prosecution of any person who has been the subject of eavesdropping, copies and transcripts of such photographs and sound recordings shall be made available to the defendant upon application to the court before whom the prosecution is pending."

First, the trial court ruled that K.S.A. 1971 Supp. 22-2513(1) was unlawful because it purported to grant authority to an assistant attorney general to make application for a wiretapping order. Defendant-appellees contend this is an improper delegation of authority in that it conflicts with 18 U.S.C. § 2516(2), the federal proviso for state-initiated wiretaps. That section in pertinent part states:

"The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State . . . may apply . . . for . . . an order authorizing, or approving the interception of wire or oral communications. . . ." (p. 4385.)

Title III and its legislative history make clear the purpose of the authorization requirement:

". . . Congress was well aware of the grave threat to the privacy of every American that is posed by modern techniques of electronic surveillance [citing S. Rep. 1097]. While recognizing the importance of wiretapping in combating organized crime . . ., Congress was concerned lest overzealous law enforcement officers rely excessively upon such techniques in lieu of less intrusive in-

vestigative procedures." (*United States* v. *King*, 478 F. 2d 494, 503.)

Therefore, Congress enacted elaborate procedural requirements for the initiation of wiretaps. Crucial to these safeguards is that each wiretap application, before it is presented to the court, be authorized by a "publicly responsible official subject to the political process". (S. Rep. 2185.) This kind of centralization insures that wiretap applications not be approved routinely by lower echelon officials and further, if abuses in the practice develop, the responsibility for those abuses would point to an identifiable person. (*United States* v. *Giordano*, 416 U.S. 505, 40 L. ed. 2d 341, 94 S. Ct. 1820.)

In *In re Olander*, supra, we were concerned with the delegation by a county attorney to an assistant county attorney of the authority to apply for an eavesdropping order. In denying this right we commented:

"No area of the law is more sensitive than that of electronic surveillance, since such activity intrudes into the very heart of personal privacy. Thus it is that legislative assemblies, including the Congress, have carefully restricted the right to apply for the use of electronic bugging devices to a very select coterie of public officers. Federal magistrates are fond of citing language excerpted from Senate Report No. 1097, 1968 U. S. Code Cong. & Admin. News, p. 2185, in explaining the legislative thinking which has undergirded the surveillance provisions in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. (18 U.S.C.A. § 2510 *et seq.*) As to § 2516(1), which pertains to the issuance of federal orders on application of

highly placed government officials, the Senate Report reads:

> " '. . . This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen.' " (p. 285.)

These authorization requirements are not mere technicalities; they are at the heart of the congressional scheme. Their purpose is not just to protect the rights of defendants, but also those of the general public from abuse of the awesome power of electronic surveillance (*United States* v. *King*, supra, p. 505). The procedures outlined in 18 U.S.C. § 2516 must be strictly complied with by law enforcement officers (*United States* v. *Narducci*, 341 F. Supp. 1107; *In re Olander*, supra).

Appellant contends it was only necessary for the attorney general to *authorize* an application for a wiretap order; that in this case the attorney general did authorize and approve the application, and that should be sufficient even though the assistant attorney general made the application. The difficulty with this contention is that under 18 U.S.C. § 2516(2) only the attorney general (the principal prosecuting attorney of the state) is authorized to make the application. The statute makes no distinction between "authorizing" and "applying". Keeping in mind the expressed objectives of Title III—to centralize in a publicly responsible

official subject to the political process the formation of policy on electronic surveillance—we think no such distinction should be made. In Kansas the attorney general can appoint as many assistant attorneys general as he may deem necessary (K.S.A. 75-3111). We cannot perceive Congress intended that at any given time the number of persons in Kansas who may obtain a wiretap order is limited only by the number of assistant attorneys general and county attorneys in existence at the particular time. It is true the record on appeal contains an affidavit dated March 21, 1975, indicating prior review and approval of the Shawnee county application by the attorney general. In *In re Olander*, supra, we declined to consider like evidence offered to shore up a county attorney's delegation power. Without in any way impugning the integrity of the affidavit in the case at bar we do not think delegation of state authority to apply for wiretaps in this fashion comports with congressional intent. Strictly circumscribing this authority to that stated in the federal act—in Kansas the attorney general—will clearly eliminate any possible after-the-fact question as to identifiable individual responsibility for the application. Inasmuch as K.S.A. 1971 Supp. 22-2513(1) was more permissive than 18 U.S.C. § 2516(2) in that it purported to authorize an assistant attorney general to make application for a wiretap order, our state statute must be held invalid as in conflict with the federal act. This means the trial court correctly ruled the Shawnee county wiretaps were illegally obtained.

In considering the validity of the electronic search warrants issued in Sedgwick county we should take further note of the constitutional standards for electronic surveillance outlined in *Berger* v. *New York*,

supra. There the federal supreme court held that the New York statute was too broad to be constitutionally permissible in five respects. First. ". . . eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described". (pp. 58-59.) The New York statute provided for a wiretap order ". . . particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof. . . ." (p. 43, footnote 1.) K.S.A. 1971 Supp. 22-2513, in essentially the same language, provided that:

> "The application for the order shall be in writing, shall be under oath and shall particularly describe the crime or crimes under investigation and the person or persons whose conduct is to be observed or whose communications or conversations are to be overheard or recorded. . . ."

Although our statute provided that the applicant for a wiretap order state the crimes under investigation, this did not mean that the applicant must state his belief that any particular crime has been or is being committed. It would appear the New York and the Kansas statute suffered the same constitutional infirmity pointed out in *Berger:*

> ". . . It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded. . . .' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations or discussions to be seized. As with general warrants this leaves too much to the discretion of the officer executing the order." (p. 59.)

Second, the court found that the New York statute authorized eavesdropping for a two-month period, which amounted to ". . . a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." (p. 59.) Prompt execution of the warrant was also not required by the New York statute. Our statute did limit the interception period to ten days but contained no provision that the order terminate when the first relevant conversation was seized, unless a special showing for a longer period was demonstrated. Even though the authorization period in Kansas was shorter than in New York, it still granted law enforcement officials an unlimited right to seize any and all conversations within that period, even if they were not relevant to any investigation, a practice specifically condemned in *Berger.*

Third, the court said that the New York statute permitted ". . . extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is 'in the public interest' ". (p. 59.) The New York statute provided that the eavesdrop order would terminate after two months ". . . unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest." (p. 43, footnote 1.) The Kansas statute provided that the order would terminate after ten days: ". . . unless extended or renewed by the magistrate who signed and issued the original order upon satisfying himself that the facts which justified

the issuance of the original order continue to exist and that such extension or renewal is in the public interest." With reference to the additional language in our statute about the requirement that the facts which justified the original order should continue to exist, *Berger* stated: ". . . Apparently the original grounds on which the eavesdrop order was initially issued also form the basis of the renewal. This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop." (p. 59.) Therefore, the requirements in the Kansas statute for an extension of an eavesdrop order were found unconstitutional in *Berger*, in that they did not require a present showing of probable cause to justify the extension order.

Fourth, *Berger* found that the New York statute ". . . places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer". (pp. 59-60.) Similarly, our statute authorized a general search which continued over the entire period of the order. This type of general search is in direct conflict with the fourth amendment.

"Finally, the [New York] statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. . . ." (p. 60.) K.S.A. 1971 Supp. 22-2513 required a return be filed with the court three days after the intercept order expired, but it made no requirement that notice of the interception be given the person whose phone was tapped, nor that special facts be shown to obviate the notice requirement. As the court said in *Berger:* ". . . [This] permits unconsented

entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized". (p. 60.)

In summary, *Berger* ruled that the New York statute was unconstitutional in at least five respects. These same defects were present in K.S.A. 1971 Supp. 22-2513, and therefore its provisions must be deemed violative of the fourth amendment.

It would appear that at the same time, as found by the trial court, K.S.A. 1971 Supp. 22-2513 was also deficient in that in several areas it did not conform to the requirements set forth in 18 U.S.C. 2510, *et seq.* enacted in compliance with *Berger.* We note some of these sections pertinent here. Section 2511 outlaws all wiretapping and all disclosures of tapped communications except for those specifically authorized by the act. Section 2515 provides:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this chapter."

Section 2518(10)(a) implements section 2515:

> "Any aggrieved person in any trial, hearing, or proceeding in or before any court . . . of the United States . . . may move to suppress the contents of any intercepted wire or oral communi-

cation, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval. . . ."

Sections 2516-2518 contain elaborate provisions for the authorization of wiretaps in criminal investigations. They are restrictive rather than expansive in their terms, prescribing in detail the contents of applications for orders authorizing wiretaps, the findings to be made by the judge to whom application is made, the contents of his order, and restrictions upon what may be intercepted. Section 2518(1) provides:

"Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued,

including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communication are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. . . ."

Subsection (3) of section 2518 prescribes the findings that the judge must make. In essence, they track the quoted provisions of subsection (1). Subsection (4) prescribes, in considerable detail, the contents of the judge's order approving a tap. These also track the provisions of subsection (1). Subsection (5) contains provisions limiting the duration of any authorized tap, including the following:

". . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days."

The trial court found K.S.A. 1971 Supp. 22-2513 failed to require the applicant for a wiretap order to state his belief that a particular crime has been or is being committed and the underlying facts to support that belief. K.S.A. 1971 Supp. 22-2513(1) provided:

> "The application for the order shall be in writing, shall be under oath and shall particularly describe the crime or crimes under investigation. . . ."

We have just quoted the facts required by 18 U.S.C. § 2518(1) (b) to be stated in a wiretap application.

In discussing this aspect of the New York statute *Berger* stated:

> "We believe the statute here is equally offensive. First, as we have mentioned, eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described. The purpose of the probable-cause requirement of the Fourth Amendment, to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed, is thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations." (pp. 58-59.)

In *United States* v. *Tortorello*, 480 F. 2d 764, the requirement of particularity was discussed:

> "Particularity in an eavesdrop or wiretap application and order is critical to the constitutionality of a surveillance. The Fourth Amendment does not permit law enforcement officers to engage in lengthy surveillance of a suspected, or even a known, criminal regarding his associations and areas of legal and illegal operations, in the hope of obtaining evidence of some unspecified crime. The Act prohibits such 'strategic intelligence surveillance' by requiring, among other measures, that the application identify the particular offense suspected and the particular conversations anticipated. . . ." (p. 779.)

The degree of particularity required in an electronic surveillance application to satisfy the federal statute is a question resting primarily on the judge's analysis of the facts in each application. No more than a pragmatic and practical view of the application papers should be necessary. However, our statute required that the applicant merely state the crime or crimes under investigation, without requiring his belief that a particular crime has been, is being, or is about to be committed and the underlying facts to justify that belief. Under any test, it was deficient in this area when compared to the federal requirements. This discussion is applicable as well to the finding of probable cause federally required to be made by the issuing judge.

Another defect in our statute found by the trial court is that it provided for extensions of the original warrant merely upon a showing that "the facts which justified the issuance of the original order continue to exist and that such extension or renewal is in the public interest". 18 U.S.C. § 2518(5) states: "Extensions of an order may be granted, but only upon application for an extension made in accordance with

subsection (1) of this section *and the court making the findings required by subsection (3) of this section*". (Our emphasis.) Subsection (3) of § 2518 details the initial findings that must be made by the court which approves a wiretap application. Therefore, the judge in reviewing an extension application, must determine that present probable cause exists for extending the order, *i.e.*, make the same findings anew that were made when the first application was approved. *Berger* stated that merely finding that the facts which justified the original order continue to exist is insufficient to justify an extension of the interception. In *United States* v. *Giordano*, supra, the federal supreme court emphasized that extension orders do not stand on the same footing as original authorizations but are provided for separately. In addition, in an application for an extension under the federal act, the applicant must set forth ". . . the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results". (§ 2518 [1] [f].) No similar requirement was contained in our statute.

There are other areas urged by appellees in support of the trial court's ruling in which our statute does not appear to have measured up to the restrictive standards fixed in the federal act. We shall touch upon them only briefly. The minimization requirement prescribed in 18 U.S.C. §2518(5) appears to be a crucial one. Essentially it provides that only those conversations relevant to the investigation actually be intercepted and that the interception be terminated immediately upon attainment of the authorization objective. Our statute contained no such safeguard. 18 U.S.C. §2518(8) (d), in conformity to *Berger*, required notice to persons affected by a wiretap application of certain

facts in connection with interceptions made, absent a showing of good cause for not doing so. Again our statute had no such requirement. In *United States* v. *Chun*, 503 F.2d 533, the court declared:

> "As we analyze § 2518 (8) (d), the inventory notice provision is a central or at least a functional safeguard in the statutory scheme." (p. 542.)

Nor did our statute include any requirement for the safekeeping of intercepted communications as contained in 18 U.S.C. §2518(8) (a) and (b).

All in all we think it clear that the trial court correctly ruled that K.S.A. 1971 Supp. 22-2513 did not comply with Title III in key respects which were essential in the federal statutory scheme regulating electronic surveillance. Evidently our legislature was of the same mind since it has repealed our former statute and replaced it with statutes that largely track the language of Title III.

Did the trial court err in determining that the evidence obtained in the July 2, 1974, intercept under K.S.A. 22-2514 to 22-2519 (Weeks 1974) was "fatally tainted" by the previous illegally obtained wiretaps? Under 18 U.S.C. § 2515, already quoted, primary or derivative evidence secured by illegal wire interceptions must be suppressed on proper motion. The use of the term "derived therefrom" in the statute is a codification of the "fruit of the poisonous tree" doctrine. This means that where information about persons whose communications government wishes to intercept through wiretap orders has been obtained through prior illegal interceptions, the communications obtained under the later wiretap orders constitute evidence "derived" from the previous illegal interceptions within the meaning of

the suppression statute (see *United States* v. *Giordano*, supra).

All the previous applications and orders used in obtaining the prior wiretap orders, as well as transcripts of certain evidence obtained in some of them and summaries of transcripts in others, and the logs of those interceptions were incorporated by reference in the July 2d application. These were all read and considered by the issuing judge. The state contends that putting aside all the evidence obtained from the prior wiretap orders, the independent evidence submitted constituted probable cause for issuance of the July 2d warrant. This concept of independent source was expressed in *Nardone* v. *United States*, 308 U.S. 338, 84 L. ed. 307, 60 S. Ct. 266. There the court held that a statutory prohibition of unlawfully obtained evidence encompassed derivative evidence as well. But the court reaffirmed that the connection between the unlawful activity and the evidence offered at trial may become so attenuated as to dissipate the taint and that facts improperly obtained may nevertheless be proved if knowledge of them is based on an independent source. The principle is illustrated constitutionally in *Wong Sun* v. *United States*, 371 U.S. 471, 9 L. ed. 2d 441, 83 S. Ct. 407. In enacting § 2515 Congress had no intention of changing the attenuation rule (S. Rep. 2184-2185). See also *United States* v. *Giordano*, supra. (416 U. S. at pp. 529-532.)

Whether independent sources of evidence sufficient to authorize the July 2d wiretap order existed was primarily a fact question based upon an evaluation of everything submitted in the July 2d applicatio..

In announcing its findings orally the trial court stated that the proceedings under the new statute were

fatally tainted with the prior intercepts; that "independent, reasonable grounds cannot be discerned in the application in July 1974 because of the intermixture to the extent that it cannot be separated out. The officer [Artman] had to rely on his knowledge gained from the Topeka intercepts to know the telephone numbers, to know Farha's place of business. Very likely a number of other things which, while he might have had other knowledge of it, couldn't be separated from the knowledge which he gained from the intercepts that I am ruling now are illegal and must be suppressed."

In its journal entry of judgment the court stated:

> "2. That the present proceedings, under K.S.A. 22-2514 et seq., are fatally tainted by the wire interceptions made pursuant to the Shawnee County authorizations under K.S.A. 22-2513 and sufficiently independent, reasonable grounds cannot be found in the 1974 applications for those orders. The knowledge of the law enforcement officers making application for the 1974 Eavesdropping Orders is based on evidence which is so intermingled with evidence tainted by the prior applications that it cannot be separated and classified as independently acquired evidence."

The trial court upon its review of the file believed it would be speculation to find independent sources of evidence of probable cause sufficient to justify issuance of the wiretap order. A large portion of the application presented to the issuing judge consisted of evidence gathered from the prior interceptions —these items were incorporated into the affidavits of the district attorney and officer Artman. The district attorney's affidavit indicated he had had discussions

with various officers involved in the prior investigations of gambling in Wichita. This obviously demonstrates a connection between all the communications already intercepted by wiretap and the asserted need for the later wiretap. The reliance upon the evidence already gathered plainly indicates this connection had not "become so attenuated as to dissipate the taint" (*Nardone* v. *United States*, supra, 308 U.S. at p. 341; *Wong Sun* v. *United States*, supra, 371 U.S. at p. 491). We have analyzed the factual contentions of the parties on each side of this issue and we cannot say the trial court erred in its determination. Hence, the evidence gathered under this last wiretap order likewise comes within the congressional suppression mandate.

The judgment is affirmed.

APPROVED BY THE COURT.

FATZER, C.J., dissenting: I must respectfully dissent. In my opinion the court is being too technical in its construction of K.S.A. 1971 Supp. 22-2513 (1) (now repealed) that the Shawnee County wiretaps were illegally obtained. As provided in 18 U.S.C. § 2516(2) the attorney general of Kansas "authorized or approved" the interception of wire communication in the Shawnee County case. The attorney general's affidavit of March 21, 1975, specifically indicates he "reviewed, authorized and approved" the Shawnee County application—this complied with K.S.A. 1971 Supp. 22-2513 (1) and 18 U.S.C. § 2516(2). I would reverse the district court's judgment concluding that the Shawnee County wiretaps were illegally obtained.

KAUL, J., joins in the foregoing dissenting opinion.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF KANSAS

No. 47,839

State of Kansas,
Appellant,
v.
Hal Farha, *et al.*, and Joan Solls, *et al.*,
Appellee.

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing by Appellee is DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date January 28, 1976

APPENDIX C

Kan. Stat. Ann. § 22-2515 (Supp. 1974):

(1) An *ex parte* order authorizing the interception of a wire or oral communication may be issued by a judge of competent jurisdiction. The attorney general, district attorney or county attorney or, in the absence of the attorney general or a district attorney, an assistant attorney general or assistant district attorney who is specifically authorized in writing by the attorney general or district attorney, as the case may be, to make an application under this section for a specified period of time, not to exceed thirty (30) days, may make an application to any judge of competent jurisdiction for an order authorizing the interception of a wire or oral communication by an investigative or law enforcement officer or agency having responsibility for the investigation of the offense as to which the application is made, when the information to be obtained may provide evidence of the commission of any of the following offenses:

(*a*) Any crime directly and immediately affecting the safety of a human life or the national security;

(*b*) Murder;

(*c*) Kidnapping;

(*d*) Treason;

(*e*) Sedition;

(*f*) Racketeering;

(*g*) Commercial bribery;

(*h*) Robbery;

(*i*) Theft, if the offense would constitute a felony;

(*j*) Bribery;

(*k*) Any violation of the uniform controlled substances act, if the offense would constitute a felony;

(*l*) Commercial gambling;

(*m*) Sports bribery;

(*n*) Tampering with a sports contest; or

(*o*) Any conspiracy to commit any of the foregoing offenses.

(2) Any investigative or law enforcement officer who, by any means authorized by this act or by chapter 119 of title 18 of the United States code, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(3) Any investigative or law enforcement officer who, by any means authorized by this act or by chapter 119 of title 18 of the United States code, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of his official duties;

(4) Any person who has received, by any means authorized by this act or by chapter 119 of title 18 of the United States code or by a like statute of any other state, any information concerning a wire or oral communication, or evidence derived therefrom, intercepted in accordance with the provisions of this act, may disclose the contents of such communication or such de-

rivative evidence while giving testimony under oath or affirmation in any proceeding in any court, or before any grand jury, of this state or of the United States or of any other state.

(5) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this act or of chapter 119 of title 18 of the United States code shall lose its privileged character. No order issued under authority of this act shall authorize the interception of all wire or oral communications of an attorney, unless there is probable cause to believe that such attorney has committed or is involved in the commission of any crime for which an order authorizing the interception of wire or oral communications may be issued pursuant to section 2[22-2515] of this act.

(6) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized by this act, intercepts wire or oral communications relating to offenses other than those specified in the order authorizing the interception of the wire or oral communication, the contents thereof and evidence derived therefrom may be disclosed or used as provided in subsections (2) and (3) of this section. Such contents and evidence may be used under subsection (4) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application, made as soon as practicable, that the contents were otherwise intercepted in accordance with the provisions of this act, or with chapter 119 of title 18 of the United States code or a like statute.

Kan. Stat. Ann. § 22-2516 (Supp. 1974):

(1) Each application for an order authorizing the interception of a wire or oral communication shall be made in writing, upon oath or affirmation, to a judge of competent jurisdiction, and shall state the applicant's authority to make such application. Each application shall include the following information:

(*a*) The identity of the prosecuting attorney making the application, and the identity of the investigative or law enforcement officer requesting such application to be made;

(*b*) A full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including (*i*) details as to the particular offense that has been, is being or is about to be committed, (*ii*) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (*iii*) a particular description of the type of communications sought to be intercepted, and (*iv*) the identity of the person, if known, committing the offense and whose communications are to be intercepted.

(*c*) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(*d*) A statement of the period of time for which the interception is required to be maintained and, if the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication first has been

obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(*e*) A full and complete statement of the facts known to the applicant concerning all previous applications made to any judge for authorization to intercept wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(*f*) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application. Oral testimony shall be under oath or affirmation, and a record of such testimony shall be made by a certified shorthand reporter and reduced to writing.

(3) Upon such application the judge may enter a *ex parte* order, as requested or as modified, authorizing the interception of wire or oral communications if the judge determines on the basis of the facts submitted by the applicant that:

(*a*) There is probable cause for belief that a person is committing, has committed or is about to commit a particular offense enumerated in subsection (1) of section 2 of this act:

(*b*) There is probable cause for belief that particular communications concerning the offense will be obtained through such interception;

(*c*) Normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous; and

(*d*) There is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of or commonly used by such person.

(4) Each order authorizing the interception of any wire or oral communication shall:

(*a*) Specify the identity of the person, if known, whose communications are to be intercepted;

(*b*) Specify the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(*c*) Specify with particularity a description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(*d*) Specify the identity of each investigative or law enforcement officer authorized to intercept the communications, and of the person making the application;

(*e*) Specify the period of time during which such interception is authorized, including a statement as to whether or not the interception, shall automatically terminate when the described communication has been first obtained; and

(*f*) Upon request of the applicant, direct that a communication common carrier or public utility, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities and tech-

nical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, utility, landlord, custodian or person is according the person whose communications are to be intercepted. Any communication common carrier or public utility, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty (30) days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of any such extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty (30) days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this act, and must terminate upon attainment of the authorized objective, or in any event at the end of thirty (30) days after the date of the order or extension thereof.

(6) Whenever an order authorizing the interception of wire or oral communications is entered pursuant to this act, the order may require reports to be made to the judge who issued the order showing what progress

has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7)(*a*) The contents of any wire or oral communication intercepted by any means authorized by this act shall be recorded, if possible, on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in a manner which will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders, and the recordings shall not be destroyed except upon order of the issuing or denying judge and, in any event, shall be kept for not less than ten (10) years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (2) and (3) of section 2 of this act for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (4) of section 2.

(*b*) Applications made and orders granted under this act shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for not less than ten (10) years.

(*c*) Any violation of the provisions of paragraph (*a*) or (*b*) of this subsection may be punished as contempt of the issuing or denying judge.

(8) The contents of any intercepted wire or oral communication or evidence derived therefrom, on the be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court of this state, unless each party, not less than ten (10) days before the trial, hearing or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized. Said ten-day period may be waived by the judge, if he finds that it was not possible to furnish the party with the above information ten (10) days before the trial, hearing or proceeding, and that the party will not be prejudiced by the delay in receiving such information.

(9)(*a*) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of this state, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom, on the gr grounds that:

(*i*) The communication was unlawfully intercepted;

(*ii*) The order of authorization under which it was intercepted is insufficient on its face; or

(*iii*) The interception was not made in conformity with the order of authorization.

Such motion shall be made before the trial, hearing or proceeding, unless there was no opportunity to make such motion or the person was not aware of the grounds

of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this act. Upon the filing of such motion by the aggrieved person, the judge in his discretion may make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice.

(*b*) In addition to any other right to appeal, the state shall have the right to appeal:

(*i*) From an order granting a motion to suppress made under paragraph (*a*) of this subsection. Such appeal shall be taken within ten (10) days after the order of suppression was entered and shall be diligently prosecuted as in the case of other interlocutory appeals or under such rules as the supreme court may adopt;

(*ii*) From an order denying an application for an order authorizing the interception of wire or oral communications, and any such appeal shall be *ex parte* and shall be *in camera* in preference to all other pending appeals in accordance with rules promulgated by the supreme court.

18 U.S.C. § 2510:

* * *

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a stat-

ute of that State to enter orders authorizing interceptions of wire or oral communications;

18 U.S.C. § 2516:

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(*a*) any offense punishable by death or imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(*b*) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(*c*) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsections (*d*), (*e*), (*f*), (*g*), (*h*) or (*i*) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(*d*) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title:

(*e*) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marijuana, or other dangerous drugs, punishable under any law in the United States;

(*f*) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(*g*) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana, or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

18 U.S.C. § 2518:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(*a*) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(*b*) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (*i*) details as to the particular offense that has been, is being, or is about to be committed, (*ii*) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (*iii*) a particular description of the type of communications sought to be intercepted, (*iv*) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(*c*) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(*d*) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(*e*) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and

the action taken by the judge on each such application; and

(*f*) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an *ex parte* order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(*a*) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(*b*) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(*c*) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(*d*) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection

with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(*a*) the identity of the person, if known, whose communications are to be intercepted;

(*b*) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(*c*) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(*d*) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(*e*) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian, or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian,

or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer,

specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(*a*) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(*b*) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (*d*) of this section on the person named in the application.

(8)(*a*) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents

of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(*b*) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(*c*) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(*d*) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(*b*) which is denied or the termination of the period of an order or

extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) The date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an *ex parte* showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before

the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(*a*) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(*i*) the communication was unlawfully intercepted;

(*ii*) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(*iii*) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(*b*) In addition to any other right to appeal, the United States shall have the right to appeal from

an order granting a motion to suppress made under paragraph (*a*) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1570

STATE OF KANSAS
Petitioner,

vs.

HAL FARHA, GERALD FARHA, PHIL RAZOOK, JAMIE THOMPSON, JOHN D. KNIGHTLY, JR., GRANT PARSONS, PETE CHRISTOPHER, and HERBERT COHLMIA,
Respondents.

STATE OF KANSAS,
Petitioner,

vs.

JOAN SOLLS, RUSSELL ADAMS, and FREDERICK MELZER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

Petitioner has failed to properly invoke the jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. May an unconstitutional state statute be treated as an enabling act, authorizing state officials to apply to state courts for electronic search warrants pursuant to 18 U.S.C. §§2510-2520?

II. Does an unconstitutional state statute authorize the oral delegation by an Attorney General to any Assistant Attorney General to apply for an electronic search warrant?

III. Is this matter properly subject to review by the Supreme Court of the United States?

STATEMENT OF THE CASE

Respondents, in order to save time and length, herewith adopt the Statement of Facts presented in the Petition for Writ of Certiorari with the following additions, clarifications and corrections.

A. Statement of Facts

Five electronic search warrants and three extension orders were issued between October 24, 1972, and July 2, 1974. All of the search warrants and extensions, with the exception of the electronic search warrant on July 2, 1974, were issued pursuant to and solely under the authority of K.S.A. 1971 Supp. 22-2513 (repealed and superseded by K.S.A. 1974 Supp. 22-2514, et seq., effective July 1, 1974). Following the interception and seizure of conversations under the electronic search warrants of October and November of 1972, respondents Gerald Farha and Hal Farha were arrested and charged with commercial gambling and conspiracy on December 1, 1972. Inventories of the intercepted conversations were filed and served on Respondents Farha on December 20, 1972. Inventories were never served upon any other parties to this action, nor was any determination ever made by the issuing judge that, in the interest of justice, other parties should or should not be served with inventories of the intercepted conversations. *State v. Farha,* 218 Kan. 394, 396, 409, 544 P.2d 341, (1975). (Petition, App. A5, A27)

While the above action was pending against the Farhas in Sedgwick County, an Assistant District Attorney received

an anonymous phone call regarding gambling activities in October of 1973. Although the Kansas Supreme Court found this to be independent, it did not find, as alleged by Petitioner, that it was "without prior knowledge" of the October and November, 1972 interceptions. (Petition, p. 7)

Petitioner states that in connection with the application for electronic search warrant on December 13, 1973:

> "The Court further ordered that the wiretaps not cease at the conclusion of the first conversations intercepted." (Petition, p. 8)

The specific ruling was more broad than this simple conclusion and actually stated that:

> "The surveillance not be terminated when the first conversation was seized." *State v. Farha,* supra, p. 397. (Petition, App. A46)

and purported to give authority to the District Attorney of Sedgwick County, Kansas to reapply for an extension of the December 13, 1973, order prior to its termination. This reapplication was made and granted on December 19, 1973, only six days after the issuance of the Court's original order.

It is incorrectly alleged on Page 8 of the Petition that:

> "Each application and electronic search warrant order involved in the two December, 1973, and the two January, 1974, intercepts complied with the requirements of 18 U.S.C. §§2510-2520." (Petition, p. 8, ¶3)

Neither the District Court nor the Supreme Court entered such a finding. Both the trial court and the Supreme Court of the State of Kansas held that the Kansas statute was unconstitutional and did not meet the standards set forth in 18 U.S.C. §§2510-2520. The conclusion of fact by the Petitioner has never been judicially determined and was, in fact, disputed by Respondents at the trial court level.

The Petitioner's factual rendition of the issuance of electronic search warrants on July 2, on the application of the Sedgwick County District Attorney requires closer scrutiny. It is not denied that Judge Calvert made a finding of probable cause to support the issuance of the warrants. It is omitted in the Petitioner's version, however, that the probable cause finding was based upon surveillance, intercepted communications and generally the cumulative information previously gathered including evidence seized under the previous interceptions issued pursuant to the authority of K.S.A. 1974 Supp. 22-2513. *State v. Farha,* 218, Kan. 394, 410, (Petition, App. A27, A28.)

Petitioner states on page 9, paragraph 3 of the Petition that informations were filed against all Respondents on September 12, 1974. For clarification, it should be noted that the Respondents Thompson, Knightley, Cohlmia, Parsons and Christopher were named and charged for the first time although they had been the subject of 1972 interceptions. In December of 1974, the Petitioner dismissed the original complaints filed solely against Hal and Gerald Farha since the original charges were included in the September 12, 1974 information.

B. How the Federal Question Arose

Petitioner's interpretation of the February 20, 1975, ruling (Petition, p. 10) does not fairly and accurately reflect the holding of the lower court. The complete finding of the Court was:

> "On February 20, 1975, the Honorable Nicholas W. Klein, judge of division No. 8 of the Sedgwick County district court, ruled that K.S.A. 1971 Supp. 22-2513 was constitutionally invalid, was deficient also because it did not comply with the procedures required by federal statute and purported to give state officials (assistant attorneys general) broader author-

> ity in seeking an electronic search warrant than was permissible under 18 U.S.C. §2510 et seq. The court suppressed the evidence obtained under all the warrants issued before July 1, 1974. It further found that the July 2, 1974, warrant issued pursuant to our present state statutes (K.S.A. 22-2514, et seq. [Weeks 1974] was 'fatally tainted' by the illegally obtained evidence under the prior warrants. The Court suppressed all the evidence derived from the July 2nd intercept and it held that the testimony of witnesses endorsed on the informations filed September 12, 1974, should also be suppressed, subject to establishment by the State that the testimony of any particular witness was not tainted by the defective intercepts. In its suppression order the court found that all defendants were 'aggrieved parties' pursuant to the provisions of 18 U.S.C. §2510, et seq. This appeal by the state ensued." *State v. Farha,* supra, p. 398; (Petition-App., A7-A8)

The Petitioner states in paragraph 2 at page 10 of the Petition that the Supreme Court of Kansas ruled that:

> "Kan. Stat. Ann. 22-2513 was constitutionally defective in that it did not comply strictly to the terms of 18 U.S.C. §§2510-2520."

This incorrectly construes the ruling of the Court. The following more accurately reflects the Kansas Supreme Court's ruling analyzing *Berger v. New York,* 388 U.S. 41, 18 L. Ed. 2d 1040, 87 S. Ct. 1873 (1967):

> "In summary, *Berger* ruled that the New York statute was unconstitutional in at least five respects. These same defects were present in K.S.A. 1971 Supp. 22-2513, and therefore its provisions must be deemed violative of the fourth amendment.
>
> "It would appear that at the same time, as found by the trial court, K.S.A. 1971 Supp. 22-2513 was

also deficient in that in several areas it did not conform to the requirements set forth in 18. U.S.C. 2510, et seq. enacted in compliance with *Berger." State v. Farha,* supra, p. 406; (Petition, App. A21)

The Petitioner, at the conclusion of its statement of the case, states that the Court held that K.S.A. 1971 Supp. 22-2513 was defective because it permitted any Assistant Attorney General to make application for electronic search warrants in conflict with 18. U.S.C. §2516(2). (Petition, p. 11) In addition to the remarkable unconstitutional similarities between K.S.A. 1971 Supp. 22-2513 and the statute found unconstitutional in *Berger,* supra, the Kansas Court found that K.S.A. 1971 Supp. 22-2513 did not meet the Federal minimum standards as set forth in 18 U.S.C. §2510, et seq. in the foregoing respect and in at least five other areas. The findings are painstakenly detailed in the opinion of *State v. Farha,* supra, at pages 404-409. (Petition, App. A21-A27).

The question of the oral authorization of the Attorney General to an Assistant Attorney General (Petition, p. 11) was not considered by the Court. The Kansas Court declined to consider the legitimacy or sufficiency of the alleged delegation by the Attorney General. Said the Court:

> "It is true the record on appeal contains an affidavit dated March 21, 1975, indicating prior review and approval of the Shawnee County application by the attorney general. In *In re Olander,* supra, we declined to consider like evidence offered to shore up the county attorney's delegation power. Without in any way impugning the integrity of the affidavit in the case at bar, we do not think delegation of state authority to apply for wiretaps in this fashion comports with congressional intent." *State v. Farha,* supra, p. 404, (Petition, App. A17)

ARGUMENT

AN UNCONSTITUTIONAL STATE STATUTE MAY NOT BE TREATED AS AN ENABLING ACT AUTHORIZING STATE OFFICIALS TO APPLY TO STATE COURTS FOR ELECTRONIC INTERCEPTION SEARCH WARRANTS PURSUANT TO 18 U.S.C. §§2510-2520.

The argument advanced by Petitioner that K.S.A. 1971 Supp. 22-2513 (repealed and superseded by K.S.A. 1974 Supp. 22-2514 et seq., effective July 1, 1974) may be treated as an enabling statute is raised by Petitioner for the first time in the Petition. Respondents submit that this position is wholly without merit. Petitioner does not contend that the Kansas Supreme Court is wrong in finding that the statute failed to comply with the minimum standards set forth in 18 U.S.C. §§2510-2520, or that the statute in question is constitutional. Petitioner does claim the interpretation of the Kansas Supreme Court is too narrow in one respect. Stripping the position of the Petitioner to its bare bones, the argument is that though the Kansas statute is unconstitutional, it is a sufficient enabling act to allow an application for the interception of wire or oral communications to be made under 18 U.S.C. §2516(2). To illustrate the folly of Petitioner's position, all that is necessary to do is to include the word "unconstitutional" within the provisions of part of 18 U.S.C. §2516(2) so that it reads in part:

> ". . . may apply to such judge for, and such judge may grant in conformity with §2518 of this chapter and with the applicable [unconstitutional] state statute . . ." (Unconstitutional added.)

To state this position of Petitioner is to effectively refute it. The obvious congressional intent has been fully explored in a number of cases. All illustrate that a state is free

to adopt restrictions on the issuance of the interception of wire or oral communications which are more restrictive than the Federal statute, but may not be less so. *In re Olander,* 213 Kan. 282, 515 P.2d 1211 (1973); *People v. Conklin,* 114 Cal. Rptr. 241, 522 P.2d 1049 (1974), 419 U.S. 1064, 42 L. Ed 2d 661, 95 S. Ct. Rptr. 657 (1974). (App. dis. for lack of a substantial Federal question); *Halpin v. Superior Court,* 6 Cal. 3d 885, 101 Cal. Rptr. 375, 495 P.2d 1295, *cert. den. sub nom; California v. Halpin,* 409 U.S. 987, 34 L. Ed. 2d 246, 93 S. Ct. 318. Congressional intent is clearly set forth in *Senate Report 1097, 1968 U.S. Code Cong. and Admin. News,* page 2187, in explaining the legislative thinking:

> "No applications may be authorized unless a specific state statute permits it. The state statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that the states will be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation."

The law of the State of Kansas is in accord with this express intent:

> "The limitations set by the federal statute are to be observed by state authorities, but we do not understand that a state is prohibited from imposing even more restrictive requirements than are set out in the federal law." *In re Olander,* supra, p. 286.

Moreover, Petitioner overlooks the principle of law that an unconstitutional statute is void from its inception. In *Norton v. Shelby County,* 118 U.S. 425, 30 L. Ed. 178, 6 S. Ct. 1121 (1886), this Court stated the principle in the following language:

> "An unconstitutional act is not a law, it confers no rights; it imposes no duties; it affords no protections; it creates no office; it is, in legal contempla-

> tion, as inoperative as though it has never been passed." 30 L. Ed. 178, 186. See also *Chicago I.L.R. Co. v. Hackett,* 228 U.S. 559, 57 L. Ed 966, 33 S. Ct. 581 (1913); *Linkletter v. Walker,* 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965); *Robinson v. Neil,* 409 U. S. 505, 35 L. Ed. 2d 29, 93 S. Ct. 876 (1973); *Felix v. Wallace County,* 62 Kan. 832, 62 Pac. 667 (1900).

In summary, it should be noted that Petitioner neither claims the Kansas Supreme Court to be wrong in declaring unconstitutional the statute in question, nor that it fails to meet minimum standards of 18 U.S.C. §2510, et seq. The Petitioner fails to recognize that the responsibility of the state is to enact standards at least as rigid, if not more so, than the Federal statutes governing interception of oral or wire communications. The Petitioner does not contend, nor can it be said, that the Kansas statute in question fails to meet even the most minimal Federal standards. Finally, the statute upon which Petitioner relies as an enabling statute is under law void *ab initio;* having no effect, it is a nullity that cannot be used for any purpose whatsoever. *Chicago I.L.R.Co. v. Hackett,* supra, 57 L. Ed. 966 at 969.

AN UNCONSTITUTIONAL STATE STATUTE DOES NOT AUTHORIZE ORAL DELEGATION BY A STATE ATTORNEY GENERAL TO AN ASSISTANT ATTORNEY GENERAL TO APPLY TO A STATE COURT FOR AN ELECTRONIC SEARCH WARRANT.

Petitioner has attempted to raise an issue that was not actually decided by the Kansas Supreme Court. The decision of the Kansas Court, in part, held that K.S.A. 1971 Supp. 22-2513(1) was more permissive than 18 U.S.C. §2516(2) in that it purported to authorize an Assistant Attorney General to make application for a wiretap order and was therefore invalid as in conflict with the Federal

Act. *State v. Farha,* supra, 218 Kan. 394 at 404, (Petition, App. A17). The issue was not whether the alleged oral delegation from the State Attorney General to an Assistant Attorney General was proper, but whether the state statute was too broad and therefore in conflict with the Federal Act and, further, whether the state statute was constitutional. On the latter issue, the Court found the Kansas statute deficient in five respects, none of which are challenged. In addition to the constitutional deficiences the Kansas Court found conflict between the Kansas statute and Title III in six (6) areas. *State v. Farha,* supra, pp. 404-409, (Petition, App. A21-A26). In judging the Kansas statute by the standards set forth in *Berger v. New York,* supra, the Court stated:

> "First. '. . . eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described.' . . .
>
> "Although our statute provided that the applicant for a wiretap order state the crimes under investigation, this did not mean that the applicant must state his belief that any particular crime has been or is being committed. . . .
>
> "Second, the court found that the New York statute authorized eavesdropping for a two-month period, which amounted to '. . . a series of intrusions, searches, and seizures pursuant to a single showing of probable cause.' . . . Our statute . . . contained no provision that the order terminate when the first relevant conversation was seized, unless a special showing for a longer period was demonstrated. . . .
>
> "Third, the court said that the New York statute permitted '. . . extensions of the original two-month period — presumably for two months each — on a mere showing that such extension is 'in the public

> interest" . . . the requirements in the Kansas statute for an extension of an eavesdrop order were found unconstitutional in *Berger,* "in that they did not require a present showing of probable cause to justify the extension order.
>
> "Fourth, *Berger* found that the New York statute '. . . places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer.' (pp. 59-60.) Similarly, our statute authorized a general search which continued over the entire period of the order. . . .
>
> " 'Finally, the [New York] statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. . . .' (p. 60.) K.S.A. 1971 Supp. 22-2513 required a return to be filed with the court three days after the intercept order expired, but it made no requirement that notice of the interception be given the person whose phone was tapped, nor that special facts be shown to obviate the notice requirement." *State v. Farha,* supra, pp. 404-406, (Petition, App. A18-A20).

The statute the Kansas court found unconstitutional was the only authority existing for a State Assistant Attorney General or Attorney General to apply to a state court of competent jurisdiction for authority to eavesdrop. Absent this grant of authority, there was no way to lawfully eavesdrop in the State of Kansas. The Petitioner does not challenge the decision of the Kansas court that the statute is unconstitutional. What Petitioner is in effect asking this Court to do is rewrite the Federal legislation, contrary to the intent of the Congress, to authorize eavesdropping in the State of Kansas in 1972, without a lawful grant of authority.

THIS MATTER IS NOT A PROPER SUBJECT FOR REVIEW BY THE UNITED STATES SUPREME COURT.

The trial court's holding, as pointed out by the Kansas Supreme Court, was that all of the evidence derived from the intercepts be suppressed and, further, that the testimony of the witnesses endorsed on the Information filed September 12, 1974, should also be suppressed, subject to establishment by the State that the testimony of any particular witness was not tainted by the defective intercepts. *State v. Farha,* supra, p. 398, (Petition, App. A7-A8). Inasmuch as the Petitioner has not yet elected to exercise the foregoing remedy mandated by the lower courts, this case is not in the posture of finality as demanded by the decisions of this Court. Whether or not this Court grants or denies certiorari, Respondents still face the specter of further litigation on the unresolved issues by the lower courts. The decision of the Kansas Court is not final in this respect. Petitioner's request places this Court in the position of rendering a decision which will not finally determine the merits of the case. This Court said in *Market Street R. Co. v. Railroad Com. of Cal.,* 324 U.S. 548, 551, 89 L. Ed. 1171, 65 S. Ct. 770 (1975):

> "Our jurisdiction to review a state court judgment is confined by longstanding statute to one which is final. Judicial Code, §237, 28 USCA §344, 8 FCA title 28, §344. Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

In the more recent case of *North Dakota Pharmacy Bd. v. Snyder's Stores,* 414 U.S. 156, 159, 38 L. Ed. 2d 379, 94 S. Ct. 407 (1973), this Court further stated:

> "The finality requirement of 28 USC § 1257 [28 USCS § 1257] which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(3). However, Petitioner fails to present either the argument that K.S.A. 1971 Supp. 22-2513 is constitutional or that it does not conflict with Federal law. In fact, Petitioner on page 13 of the Petition admits these two findings of the Kansas Court. Respondents submit that Petitioner has failed to establish the jurisdictional prerequisites set forth in 28 U.S.C. 1257(3).

The Petition amounts to nothing more than a request for an advisory opinion. This Court stated in *Herb v. Pitcairn,* 324 U.S. 117, 125, 126, 89 L. Ed. 789, 65 S. Ct. 459 (1945):

> ". . . our only power over state court judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal law, our review would amount to nothing more than an advisory opinion."

There is no claim that this is a question of substantial interest to a great number of persons, or that there are any decisions in conflict throughout the country. Respondents submit that the opinion of the Kansas Supreme Court is

clearly correct and rests on the decision of the Kansas Supreme Court as set forth in the Appendix. Finally, it must be noted that the statute which is under consideration in this case has been repealed effective July 1, 1974. The Kansas legislature, prior to the decision by the Kansas Supreme Court in the instant case, recognized that the 1971 statute was totally deficient and unconstitutional and therefore remedied that by passing the present statutes, which, as the Kansas Court found, "largely track the language of Title III." *State v. Farha,* supra, p. 410, (Petition, App. A27).

CONCLUSION

Petitioner has failed to establish a colorable question for review by this Court. Moreover, the decision of the Kansas Supreme Court is clearly correct and for the reasons set forth in this brief, it is submitted the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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